

Unified Screening Mechanism for Non-refoulement Claims

Submission of Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) submits its views on the unified screening mechanism (“USM”) for non-refoulement claims that the Security Bureau of the HKSAR Government announced on 7 February 2014 for commencement of operation on 3 March 2014.
2. The HKBA notes that although the Security Bureau briefed the Legislative Council Panel on Security in July 2013 that the Administration was minded to implement the Court of Final Appeal’s judgments in *Ubamaka v Secretary for Security & Anor* [2013] 2 HKC 75 and in *C & Ors v Director of Immigration* [2013] 4 HKC 563 by introducing USM “to assess claims for non-refoulement protection lodged by persons not having the right to enter and remain in Hong Kong on the basis that removing them to another country would expose them to, in addition to a risk of torture as defined under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a risk of (a) torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights (BOR Article 3 claims); and/or (b) persecution with reference to the principle under Article 33 of the 1951 Convention relating to the Status of Refugees (persecution claims)” (see LC Paper No CB(2)1465/12-13(01) (June 2013)), there were matters that still required study at that time.
3. However, the Security Bureau has never consulted the legal profession on the operational details of the USM. Members of the legal profession who were duty lawyers providing publicly funded legal assistance with the Duty Lawyer Service were only provided with several documents in draft form (which included a Note to officers of the Special Assessment Section of the Immigration Department (of

39 pages), a Notice to Persons making a non-refoulement claim (of 23 pages), a Non-refoulement Claim Form (of 25 pages), an Acknowledgement of Receipt (of 2 pages) and an Interviewing Protocol (of 10 pages)) in late January 2014, when they were about to attend training classes. The HKBA has never been formally provided with the operational details of the USM for the purpose of solicitation of views prior to their finalization on or about 7 February 2014.

4. The HKBA also notes that the documents that the duty lawyers received do include transitional arrangements concerning claimants whose claims under CAT have reached different stages of processing, determination, appeal and judicial redress. The Security Bureau's press release of 7 February 2014 referred only to "suitable arrangements". Rather, some duty lawyers who attended a top-up training course organized by the HKBA were told verbally by a spokesperson from the Immigration Department of transitional arrangements relating to some such claimants but not necessarily all such claimants. And those duty lawyers were only provided with the finalized version of the Note to officers of the Special Assessment Section of the Immigration Department, the standard letter to CAT claimants on implementation of the USM dated 10 February 2014, and the "Supplementary Claim Form" (of 25 pages) on 11 February 2014.
5. The HKBA further notes that the introduction of the USM will affect the arrangements for appealing against decisions of case officers on non-refoulement claims. However, there has to date been no publication or publicity on the arrangements on how pending and future appeals on CAT and non-refoulement claims will be handled, apart from the indication that the members of the present statutory Torture Claims Appeal Board ("TCAB") will hear and determine appeals and petitions all aspects of non-refoulement claims.
6. The HKBA furthermore notes that the Security Bureau's press release of 7 February 2014 broke the news that the United Nations High Commissioner for

Refugees (“UNHCR”) will cease screening asylum claims under its mandate in Hong Kong following the introduction of the USM.

7. The HKBA deplors this highly unsatisfactory situation, which has left significant changes and proposals uncommented, and potential difficulties unidentified, until days before the USM is to commence operation and a few days after the transitional arrangements under the USM have come into operation.

Major Difficulties

8. Despite the claim of the Security Bureau that the USM is a “unified” mechanism, it is only a combination of mechanisms using the same case officer to determine three types of claims applying three sets of standards and asking the same appeal board to hear appeals/petitions from the decision of that case officer, again applying three sets of standards.
9. The difficulty of the USM goes beyond the misnomer of its title. The determination of CAT claims is underpinned by statute, namely Part VIIC of the Immigration Ordinance (Cap 115), whereas the determination of BOR Article 3 claims and the determination of persecution claims are not; they are administrative schemes and Part VIIC of the Immigration Ordinance does not purport to deal with such claims.
10. However, the USM purports to treat all non-refoulement claims made by way of a Non-refoulement Claim Form as if they are all governed by Part VIIC of the Immigration Ordinance and purport to apply the provisions of Part VIIC on all of them. Many provisions of Part VIIC are stringent procedural requirements carrying serious consequences for non-compliance. Many other provisions of Part VIIC empower the Director of Immigration to require information and documentation, to attend a medical examination, to detain pending determination, to revoke a favourable decision, and to limit subsequent claims. The HKBA

seriously doubts whether this approach of the USM is a proper one. For example, section 37ZD in Part VIIC allows the case officer and the TCAB to take into account as damaging the claimant's credibility specified behaviour of the claimant "[in] considering a torture claim". One can therefore suggest that while the case officer and the TCAB are entitled to apply section 37ZD in assessing the credibility of a claimant in respect of his or her CAT claim, the case officer and the TCAB may not do so in assessing the credibility of the same person in respect of his or her BOR Article 3 claim and/or persecution claim. Such a situation is plainly unsatisfactory, if not ridiculous.

11. While this aspect of the USM is less likely to affect claimants who are required to submit afresh the Non-refoulement Claim Form, the hundreds of persons who have had their CAT claims determined but have indicated that they wish to seek protection against refoulement under BOR Article 3 and the Refugee Convention Article 33 cannot be dealt with in the same manner. According to information, these claimants will be asked to complete a different "Supplementary Claim Form" and their CAT claims, which have already been decided, will not be re-examined. Hence there is no legitimate basis to apply the provisions of Part VIIC to them. For the Immigration Department to further assess their claims under BOR Article 3 and/or the relevant protection of the Refugee Convention, the case officers must abide by the high standards of fairness of administrative law and may not attempt to apply to them any of the statutory requirements and powers in Part VIIC.
12. The differing legal basis for the three assessments under the USM affects also the process of redress following a decision by the case officer. The rejection of a CAT claim is subject to statutory appeal to the TCAB. The rejection of a BOR Article 3 claim or a persecution claim is subject to administrative petition to an adjudicator vested with delegated authority of the Chief Executive under Article 48(13) of the Basic Law. The statutory appeal process of the TCAB is governed by Schedule 1A of the Immigration Ordinance, which was enacted solely for the purposes of

the TCAB. Although members of the TCAB will be vested with the said delegated authority so that they may hear and determine also petitions against the rejection of a BOR Article 3 claim or a persecution claim in respect of the same claimant, this vesting of authority does not mean that Schedule 1A of the Immigration Ordinance can apply to the hearing of the petition. The HKBA has received no information or briefing as to how these parallel systems of statutory appeal and administrative petition are envisaged to operate. The HKBA underlines in this connection that the appeal/petition processes must be a genuine rehearing of the claims on the facts and legal issues.

13. The HKBA notes that the Law Society of Hong Kong had made a submission to the Legislative Council Panel on Security in July 2013 calling for the USM to be established by legislative amendments. The HKBA joins the Law Society in urging the Administration to amend the Immigration Ordinance not only to put the screening of non-refoulement claims on a statutory basis, but also to take stock of the experience in the implementation of the CAT claim screening mechanism under Part VIIC of the Ordinance.

14. Another major difficulty stems from the modification of the arrangements between the Administration and the UNHCR. The information that is publicly available thus far suggests that a person arriving in Hong Kong who wishes to seek recognition as refugee under the mandate of the UNHCR must first make a non-refoulement claim with the Immigration Department but, according to the Note to the officers of the Special Assessment Section of the Immigration Department, non-refoulement claims under the USM may be made only if the person is subject or liable to removal from Hong Kong and apart from a risk State, he does not have the right of abode or right to land in or right to return to any other State in which he would be entitled to non-refoulement protection or he is a person whose surrender as a fugitive offender is requested by another State. This means that such a person may not make any claim while he is lawfully in Hong Kong (and this includes lodging a claim with the UNHCR) and he or she is

obliged to at least overstay the limit of stay before a claim may be made and accepted for processing by the Immigration Department. Yet making one liable to removal from Hong Kong means that the provisions for detention and criminal prosecution under the Immigration Ordinance becomes applicable to him or her.

15. Even if a claim of persecution risk is accepted by the Immigration Department as substantiated, this does not mean that the claimant is recognized as a refugee under the Refugee Convention. The Administration, it seems under the arrangement with the UNHCR, would pass the information of the successful claimant to the UNHCR for the latter to consider recognizing him or her as a refugee under the mandate and to provide for a durable solution. However, there is no information of the arrangement between the Administration and the UNHCR regarding the processing of refugee status recognition after a successful persecution risk claim. For example, is the UNHCR obliged to recognize each and every successful persecution risk claimant? If not, is there a mechanism for redress with the UNHCR? And if the UNHCR does not recognize a successful persecution risk claimant, is his or her non-refoulement protection jeopardized?

16. The legal profession has repeatedly called upon the Administration to reconsider its position regarding the extension of the Refugee Convention to Hong Kong so that the screening mechanism for persecution claims can truly become a mechanism for refugee status determination and afford effective protection and processing of claims. The legal profession has also repeatedly asked the Administration to consider providing a temporary permission to remain to asylum seekers which would end on determination of the asylum claim, including any appeals. The legal profession has further repeatedly reminded the Administration that the People's Republic of China is a State Party to the Refugee Convention and that the Macao Special Administrative Region is a territory of China to which the Refugee Convention has been extended. The HKBA makes these submissions once again.

Other Applicable Grounds

17. The Note to officers of the Special Assessment Section of the Immigration Department suggests that a non-refoulement claim may be substantiated on “applicable grounds” which include the substantiation of a CAT claim, a BOR Article 3 claim or a persecution claim and the establishing of “other grounds that warrant the provision of non-refoulement protection to the claimant” (paragraph 54). The Non-refoulement Claim Form does not appear to make provision for the articulation of such “other grounds”. The Immigration Department should further explain what such “other grounds” are and remind claimants and their legal representatives the opportunity of presenting such “other grounds”.

Transitional Arrangements

18. Some duty lawyers have learnt in the HKBA’s top up course on 8 February 2014 that certain categories of such claimants will be required to attend a briefing session, supplied with a “Supplementary Claim Form” and then required to submit the completed “Supplementary Claim Form” within 21 days beginning from the date of the notice of requirement to submit the “Supplementary Claim Form”. The standard letter of the Immigration Department to CAT claimants on the implementation of the USM, which provides “a brief outline about the transitional arrangements for general reference” and is dated 10 February 2014, and the “Supplementary Claim Form” were provided to those duty lawyers on 11 February 2014.
19. The HKBA notes that the standard letter of 10 February 2014 disclaims itself to be a comprehensive document of the transitional arrangements. The recipients are informed that the standard letter “serves to give a brief outline about the transitional arrangements for general reference only. You are reminded to seek advice from your duty lawyer or legal representative(s) as necessary”. The HKBA expresses serious concern over this irresponsible approach taken by the

Immigration Department since the Note to officers of the Special Assessment Section of the Immigration Department does not set out in detailed terms the transitional arrangements, and the presentation given by the spokesperson of the Immigration Department on 8 February 2014 was found to have failed to address all possible scenarios. It is difficult and risky for duty lawyers and legal representatives to give advice to claimants on transitional arrangements that are formulated by the Immigration Department if all of them have not been fully briefed by the Immigration Department. The HKBA calls upon the Immigration Department to publish to the Duty Lawyer Service, the HKBA and the Law Society a comprehensive document setting out the transitional arrangements the department has formulated for the implementation of the USM.

20. It is not known whether the same case officer will examine the completed "Supplementary Claim Form" and make the decision regarding the BOR Article 3 claim and the persecution risk claim (though it might be the case on the face of one statement in the standard letter of the Immigration Department dated 10 February 2014); whether there will be a screening interview; and whether issues that had been determined earlier in relation to the CAT claim, such as credibility, country conditions, claim of previous torture or ill-treatment, claim of discriminatory treatment, and internal flight/relocation, would be re-examined and fresh consideration given.
21. Further, on the two occasions in which duty lawyers heard presentations from spokespersons of the Immigration Department, nothing was said about the arrangements have been put in place to cater for CAT claimants who have a pending appeal before the TCAB and had earlier indicated or reserved their position for making a BOR Article 3 claim and/or a persecution risk claim. Rather, in the week beginning on 10 February 2014, some duty lawyers who had appeals pending before the TCAB were informed by the Duty Lawyer Service that the TCAB had sent the appellant a letter dated 7 February 2014 concerning the implementation of the USM and the option for the appellant to defer the hearing

of the pending appeal by applying for an adjournment on the ground that he or she has made a BOR Article 3 claim and/or persecution risk claim. The HKBA finds it surprising that the Administration had omitted to brief duty lawyers of this transitional arrangement, which must have been decided upon well before 7 February 2014.

22. On the other hand, it is not known whether there is any transitional arrangements applying to those CAT claimants whose appeals or petitions had been dismissed and who have made an application for judicial review, and who had earlier indicated or reserved their position for making a BOR Article 3 claim and/or a persecution risk claim.
23. Furthermore, the categories discussed by the Immigration Department's spokesperson suggest that not all CAT claimants whose CAT claim has been determined will be invited to attend the briefing session for the purpose of making a BOR Article 3 claim and/or a persecution risk claim through a completed "Supplementary Claim Form". It seems that only those who had made one or both claims will be so invited. This arrangement begs the question of what indication the Immigration Department takes to be an acceptable indication for the purpose of inviting to the briefing session. Given the commonalities between the CAT claim and the BOR Article 3 claim, and in order to avoid any likely dispute in particular cases over whether certain "magic form of words" had been used, the HKBA suggests that all CAT claimants who remain in Hong Kong should be invited to attend a briefing session and be given the opportunity to submit a completed "Supplementary Claim Form".
24. The legal profession has criticized the 28 days time limit for returning the completed Torture Claim Form as "simply unrealistic and harsh". The Immigration Department's transitional requirement of the 21 days time limit for returning the completed "Supplementary Claim Form" is more unrealistic and harsh. It cannot be assumed that a CAT claimant would need less time to

complete a "Supplementary Claim Form" and submit it with supporting documents and other materials to substantiate his or her BOR Article 3 claim and/or persecution claim. The differences between a CAT claim on the one hand and a BOR Article 3 claim and/or a persecution claim are significant and the proper presentation of a BOR Article 3 claim and/or a persecution claim requires an equal, if not extra, effort, bearing in mind that in presenting the claim(s) under the "Supplementary Claim Form", the claimant often will need to address issues that the Immigration Department had already taken a view, obtain documents and information relevant to the context of the claim(s), seek up-to-date country and risk related conditions, and deal with new issues that the nature of a BOR Article claim and/or a persecution claim necessitates their examination.

Country of Origin Information

25. The HKBA considers that the Immigration Department should as a matter of routine disclose to the Duty Lawyer Service the categories and descriptions of country of origin information that case officers refer to in making decisions under the USM.

26. The HKBA learns that the Immigration Department had sent in the last few years immigration officers to Bangladesh, India, Pakistan and Sri Lanka to conduct field studies. The HKBA considers that the reports of the immigration officers' field trips should be disclosed to the Duty Lawyer Service for consideration by duty lawyers assisting claimants from those countries. There should be a continuing arrangement for disclosure and supply of such reports and information whenever a fresh field study or request for information is conducted be it for the updating of knowledge and information on one of those countries or for the gaining of knowledge and information on other countries.

27. The HKBA is of the view that these suggested courses of action are consistent with the discharge of the joint endeavour between the claimant and his or her legal representative on the one hand and the decision-maker on the other hand in the proper examination of a non-refoulement claim.

Dated 14th February 2014.

HONG KONG BAR ASSOCIATION